PP

v.

POH AH KWANG

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL CASE NO: 45-12-2001]
9 APRIL 2003

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in methamphetamine - Drugs strapped to person of accused - End of prosecution case - Material witness not examined - Break in chain of handling of exhibits - Drugs not 100% homogenous - Whether fatal - Whether prima facie case not made out - Dangerous Drugs Act 1952, ss. 2, 37(d), 37(da) (xvi), 39B(1)(a) - Evidence Act 1950, s. 92*

The accused was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') for trafficking in 73.68 grams of methamphetamine tablets. The evidence as led by the prosecution showed that the accused was arrested at Bayan Lepas Airport on 9 September 2000 after security officers ('SP2' and 'Mohd Dollah') found two packets of the offensive substances strapped to his waist. At the airport, the accused told SP2 that the packets contained 'itchy pills' but subsequently told Mohd Dollah that they were 'medicines'. The drugs were then taken custody of by the police exhibit keeper ('SP3') who handed same to the Investigating Officer ('SP5') on 3 September 2002, the scheduled date of the trial. The facts showed however that the case was only heard on 5 September 2002, and it was only then that the drugs were produced in court for identification. These evidence aside, the chemist testified that he took only 16.5 grams out of the total 319.959 grams of the drugs for analysis, that he used a domestic blender to grind the drugs, that the blender did not have sharp blades and that the pills, as a result, could not be evenly powdered so as to be 100% homogenous.

At the close of the case for the prosecution, a question arose as to whether a *prima facie* case of trafficking had been made out against the accused, considering that the prosecution: (i) was relying on s. 2 of the Act to prove the act of trafficking; (ii) had chosen to offer Mohd Dollah to the defence and not to examine him; and (iii) had not accounted for the whereabout of the drugs between 3 September 2002 and 5 September 2002.

Held:

[1] The evidence of PW2 was uncorroborated in so far as the answers given by the accused was concerned. It was incumbent on the prosecution to call Mohd Dollah to refute *inter alia* the suggestions that it was he who examined the accused or that the accused had told him that the pills were medicines, and not just to offer him to the defence. The failure to call Mohd Dollah to corroborate SP2 and to refute the accused's suggestions was the first fatal blow to the prosecution's case. (p 728 a-e)

[2] There was a serious gap in the chain of handling the drugs and the exhibits that were produced in court. There was an unexplained gap of two days, whereof the court had not been told what happened to the drugs and the exhibits during the said period. On the facts, the drugs and exhibits had just disappeared and reappeared. The court cannot assume that the exhibits tendered in court on 5 September 2002 had been kept safely during the unexplained two days. This is another fatal blow to the prosecution's case. (pp 728 g-h & 729 c)

[3] The chemist evidence was far from satisfactory. Bearing in mind s. 37(da)(xvi) of the Act, the chemist in his analysis of only 16.5 grams had fallen far short of the statutory minimum 50 grams that ought to have been analysed. The chemist in his report also failed to identify the letters "WY" imprinted on the pills, creating thereby a doubt as to the identity of the pills. His explanation that he did see the letters but omitted to record them flew in the face of s. 92 of the Evidence Act 1950 and must be rejected. Further, upon the admission of the chemist, the homogeneity of the drugs in powdered form is also questionable. (pp 730 c, 730 f-g & 731 c)

Obiter:

[1] The court cannot see why the Department of Chemistry will not change its set views in the way it goes about analysing the drugs by at least adopting the decisions of the courts on this issue. Persons charged with trafficking are being set free merely on the chemist's evidence. Surely, it is time for the chemists to get together and see that the same mistakes are not repeated over and over again. (p 729 d-e)

[2] Any retention of the passport of the accused by this court after the acquittal is a violation of art. 5(1) of the Constitution. Further, what this court can dispose of under s. 406A Criminal Procedure Code are exhibits relating to the commission of the offence like the drugs, the vehicle in which the drugs were transported and such like exhibits. The passport of a person cannot be the subject of disposal of exhibits. It must be returned to its owner. (pp 735 a & f)

[Accused acquitted and discharged at end of prosecution case.]

Case(s) referred to:
Ah Mee v. PP [1967] 1 MLJ 220 ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Leow Nghee Lim v. Reg [1956] 22 MLJ 28 ***(refd)***
Loh Wai Kong v. Government of Malaysia & Ors [1978] 2 MLJ 175 ***(refd)***
Shukri Mohd v. PP [1995] 3 CLJ 799 SC ***(refd)***
Teoh Hoe Chye v. PP [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
Toh Ah Loh & Anor v. Rex [1949] MLJ 54 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 406A
Dangerous Drugs Act 1952, ss. 2, 37(da)(i), (xvi), 39(B)(1)(a)
Evidence Act 1950, ss. 91, 92
Passports Act 1966, s. 2(2)
Poisons Act 1952, s. 32(2)

For the prosecution - Tuan Azhar Mokhtar
For the respondent - Jagdeep Singh Deo; M/s Karpal Singh & Co

Reported by WA Sharif

JUDGMENT

RK Nathan J:

The accused was charged with an offence under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 73.68 grams of methamphetamine tablets and punishable with death under s. 39B(2) of the same Act. The offence was alleged to have been committed on 9 September 2000 at about 7.20am at or near the entrance to the departure gate at the Bayan Lepas International Airport in the district of Barat Daya in the State of Pulau Pinang.

The Evidence

SP1 the police photographer testified that he accompanied Insp. Tee Ah Chiew to the International Airport Bayan Lepas, Penang where he took the photographs of the scene. He then accompanied Insp. Tee to the Mid-Town Hotel at Macalister Road where he was instructed to take further photographs of a room, the number of which he could not remember. Then in the afternoon at the office of Insp. Tee he took further photographs of the drugs in question. The next witness SP2 was the prosecution's star witness. He was at all material times the airport security officer. On 9 September 2000 at about 7.20am he was on duty at the entrance to the departure gate at the Bayan Lepas International Airport. There were also four other police constables assisting him at that time. His duty was to frisk male passengers about to board the planes. Together with a constable and a corporal he positioned himself close to the walkthrough

-detector (detector). The female constable frisked women passengers whilst the corporal monitored the x-ray machine. The frisking of the passengers would take place after they had walked through the detector. Whilst frisking a passenger around the waist he felt something hard at the front of the waist-line below the stomach. He identified the male passenger as the accused. He then touched the hard object and asked the accused in English "what's this?". The accused replied that it was nothing. He then called another male officer, Mohd. Dollah who was then at the Domestic sector, for assistance. He called for Mohd. Dollah as he wanted him to be a witness whilst he conducted a hundred percent body check of the accused in a room. The accused removed his jeans and long-sleeved shirt. He noticed the accused wearing a pair of tight white "Umbro" rubber shorts. He then directed the accused to pull the rubber tights. He then noticed that the accused had three 'knee guards' wrapped tight round his waist. The 'knee guards' wrapped round his waist cannot be seen if he did not pull his tight rubber shorts. However the knee guards had a bulge at the front below the stomach. He then instructed the accused to remove the items that caused the bulge. The accused then took out two chocolate-coloured plastic packets. SP2 then cut open one of the two packets. Inside he found smaller blue-coloured plastic packets and inside those packets he found pink tablets with the letters 'WY' stamped on each pill. He then asked the accused what those pills were and the accused replied that they were "itchy pills". He then directed the accused to put on his clothes whilst he took possession of the two chocolate-coloured packets. His colleague Mohd. Dollah was present in the room throughout the examination. He then requested Mohd. Dollah to call the supervisor for the day, Corporal Salbiah. All of them proceeded to the police station which was situated at the ground floor. The officer of the station than telephoned for the investigating officer, Insp. Tee. When Insp. Tee arrived SP2 handed over to him the two chocolate-coloured packets. Insp. Tee then proceeded to count the tablets in the presence of the accused. In one chocolate-coloured plastic packet there were nine blue-coloured plastic packets and in the other, there were eight plastic packets. After counting the pills from each blue-coloured packet which each contained 190 dark red pills (merah hati) he placed them back into each of the blue-coloured packets. After the pills had been counted, they found that the packets contained a total of 3230 pills. SP2 then lodged a police report. The total weight of the pills was found to be 332 grams. He then issued out a search-list. He also produced the accused's Singapore Passport and a ticket in the name of the accused departing Penang to Hong Kong on Flight No. CX 720.

Under cross-examination the witness admitted speaking to the accused both outside and inside the special examination room. He also confirmed that the pills emitted no smell to denote that they were prohibited drugs. He vigorously

denied the defence suggestion that Mohd. Dollah assisted him in the physical examination of the accused and was just not a passive witness. When his police report was read to him which showed that he had recorded in the said report as having asked Mohd. Dollah to assist him in the examination of the accused in the room, he explained that what he had meant was to assist him as a witness. He also denied the suggestion that neither did he ask any questions of the accused nor did the accused say anything. When the accused walked through the detector it emitted a sound and as a result thereof he frisked the accused. It was put to him that Mohd. Dollah on discovering the two chocolate-coloured plastic packets asked the accused what they were and the accused answered that they contained medicine (ubat). It was then that Mohd. Dollah asked if there was any certificate from a doctor with regard to the pills and that the accused had said there was none. He also denied the suggestion that Mohd. Dollah cut open one packet and took out a pill and directed the accused to remain where he was and that soon thereafter a policeman arrived and took the accused to the police station situated at the airport. He also denied a suggestion that on the way to the police station the accused had asked "Adakah apa-apa hal? Kenapa saya ditahan?" He also denied that the police told the accused that he was suspected of carrying pills that make the head shake and that upon examination if the pills were proven not to cause the head to shake he would be set free. He said he did not know if at the police station the accused had said to a question by an Indian police officer that they were medicinal pills. However he denied a suggestion that the accused did not refer to the pills as 'itchy pills'.

The next witness for the prosecutor was SP3, the keeper of exhibits at the police station. He testified that on 3 September 2002 all the exhibits relating to this case were taken from him by Insp. Tee and were thereafter not returned to him and the reason he gave was because the said exhibits were tendered to the court on the same day. But this is not correct as on 3 September 2002 the case did not go on as the learned Deputy Public Prosecutor was ill and this case was adjourned to 5 September 2002 when the said exhibits were tendered for identification.

The prosecutor then called the chemist. He confirmed having received the pills for analysis. He described the colour of the pills as brick-red (merah bata). The weight of each of the two packages were 169.47 gram and 150.18 grams respectively. He then took a total of 16.5 grams for analysis. Under cross-examination he admitted that this was the first case he had handled regarding methamphetamine pills. To grind the pills to powder so as to homogenise them as evenly as possible, the 8-9 chemists in Penang would use the 5-6 blenders that were available. He could not tell the age of the blenders but confirmed

that the blender he used was one where the blades could not be replaced. He also admitted to a suggestion that the blades of the blender he had used were not sharp and because of that he also agreed that the pills could not be powdered evenly to be certified one hundred percent homogenous and he further agreed that homogeneity is an important and vital pre-requisite to the process of analysing the said pills. He was then shown the chemist's report that he had prepared (exh. P43). He admitted that he had omitted to mention the letters "WY" that were found on the pills. He also confirmed that possessing methamphetamine pills without licence is an offence both under the Dangerous Drugs Act 1952 and the Poisons Act 1952.

The last witness for the prosecution was the investigating officer who tendered all the various exhibits. During the cross-examination counsel for the accused tendered the cautioned statement made by the accused (D46) not for the purposes of challenging the contents but for the purpose of relying on the contents of the statement. The prosecution then closed its case and offered various witnesses including Mohd. bin Dollah, to the accused.

Findings Of The Court

Is One Eye-Witness Sufficient To Establish A Prima Facie Case

There is no doubt about the facts of the case. Counsel for the accused readily conceded to this. However counsel pointed out that out of the five witnesses called for the prosecution only one was called who was at the scene of the arrest, namely SP2. I am surprised that the prosecution failed to call Mohd. Dollah, the other witness who was present in the room where the one hundred percent body check on the accused was conducted. I would have thought that at least as a corroborative witness Mohd. Dollah would have been called; but instead the learned deputy offered Mohd. Dollah as a defence witness. As the offence with which the accused stands charged is said to have occurred on 9 September 2000 s. 180(1) of the amended Criminal Procedure Code applies since the amendment took effect on 31 January 1997 (A979). The said amended section reads as follows:

> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
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> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

Since the standard of proof at this stage is *prima facie* proof, which means a maximum evaluation of the evidence on the basis of proof beyond reasonable doubt, the evidence of SP2 is therefore for all intents and purposes uncorroborated in so far as the answers given by the accused were concerned. When asked in cross-examination what those pills were, the accused was supposed to have said "itchy pills". It was suggested by the defence that it was Mohd. Dollah who actually examined the accused in the room and that on discovering the two chocolate-coloured plastic packets he had asked the accused what they were and the accused had responded that they contained medicine (ubat). Mohd. Dollah then asked the accused if he had a doctor's certificate to possess the medicine and the accused had replied in the negative. With all these facts having been put to SP2 surely it was all the more incumbent upon the prosecution to have called Mohd. Dollah to refute such suggestions. Merely offering the witness to the defence is absolutely not enough. Surely the prosecution does not expect the accused to call Mohd. Dollah to refute such evidence. The prosecution ought to have done so. It must be remembered that it is necessary for the accused to put his case to the prosecution witnesses at the earliest possible stage of the case. By putting his case to the prosecution's witnesses, the accused would have taken an irreversible step towards his own defence because if the defence is called, and during his case if he fails to stick to the suggestions made to the prosecution's witnesses during cross-examination, his defence must fail. Therefore as the accused in this case had already put various suggestions as to the part played by Mohd. Dollah, the failure to call Mohd. Dollah to corroborate SP2 and to refute the accused's suggestions was indeed the first fatal blow to the prosecution's case.

Break In The Chain Of Evidence

SP3 the store-keeper testified that the exhibits including the drugs which were in his custody were taken from him by the investigating officer (SP5) on 3 September 2002 for the purposes of the trial. His evidence was that after 3 September 2002 the exhibits were not returned to him because he said the said exhibits were tendered to the court on the same day. However this is incorrect as the case did not proceed on 3 September 2002 as the learned deputy was ill and the case was adjourned to 5 September 2002 whereas the record shows that the said exhibits were tendered for identification. There is an unexplained gap of two days and this court has not been told what happened to the drugs and the exhibits during those two days. At least if the investigating officer had, since the case was to be continued on 5 September 2002, and as he was busy, kept the drugs locked in the same cabinet that he had earlier kept them in, and that other than himself no one else had access to the same cabinet, there would have been a readily acceptable explanation. As it is, the drugs and exhibits disappeared and re-appeared. Since this is a case involving the death

penalty I cannot even assume that the exhibits tendered in court on 5 September 2002 had been kept safely during the unexplained two days. In *Teoh Hoe Chye v. PP* [1987] 1 CLJ 471; ([1987] CLJ (Rep) 386) the Federal Court said at p. 473 (p. 389), as follows:

> We would observe at this point that the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence." (*Su Ah Ping v. Public Prosecutor*). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.

I find that there is a serious gap in the chain of handling the drugs and the exhibits that were produced in court. This by itself is another fatal blow to the prosecution's case.

Chemist' Evidence

I find the evidence of the chemist far from satisfactory. I cannot see why the Department of Chemistry will not change its set views in the way it goes about analysing the drugs by at least adopting the decisions of the courts on this issue. Almost every trial judge has been commenting on the manner in which the chemists carry out their analysis. The law journals are replete with decisions clearly pointing to the inadequacy of the analysis by the chemist. Persons charged with trafficking are being set free merely on the chemists' evidence. Surely it is time for the chemists to get together and to see that the same mistakes are not repeated over and over again.

In this case the chemist testified that he had ascertained the weight of the two packages containing the pills as being 169.47 and 150.189 grams respectively, amounting to 319.659 grams and after grinding the pills (I shall touch on this later) he analysed samples weighing a total of only 8.456 and 8.071 grams respectively from each of the said two packages amounting to 16.527 grams. To my mind this miserably falls short of the adequate quantity required to be analysed in a trafficking case.

Section 37(da) (XVI) of the Act reads as follows.

Section 37. In all proceedings under this Act or any regulations made thereunder:

(da) any person who is found in possession of:

(XVI) 50 grammes or more in weight of Methamphetamine

Otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

It ought to have been as plain as pikestaff to the chemist that his analysis of only 16.527 grams had fallen far short of the statutory minimum of 50 grams that ought to have been analysed. Since the requirement of sub-s. (XVI) needs a minimum of 50 grams I cannot understand why the chemist did not follow this simple guideline. In fact in *Leong Bon Huat v. PP* [1993] 3 CLJ 603 SC the total weight of the cannabis seized was 793.85 grams. By analysing more than 10% of the net weight of 793.85 grams the Supreme Court held at p. 606 that:

> ... the chemist at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s. 37(da) of the Act.

Since the highest court of the land has settled this issue it is hoped that the Department of Chemistry will take heed and follow set authorities so that those who actually commit such crimes do not escape the might of the law by the slight of the chemist.

Another unacceptable feature of the chemist's evidence goes to the identity of the pills. SP2 who was more thorough in his observations had described the pills as having imprinted on them the letters 'WY'. Such an obvious identification was totally missed by the chemist, leading to the doubt as to the identity of the pills. However in evidence he said that such letters were on the pills but that he had omitted to record them.

To my mind such an explanation flies in the face of s. 92 of the Evidence Act 1950, which provides that subject to certain provisions, no evidence of any oral statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms. P43 the Chemist's Report is a document that is required by law to be reduced into writing pursuant to s. 399 of the Criminal Procedure Code. It must therefore be conclusively presumed that whatever is stated in P43 contains a full and final statement of the intentions and conclusion of the chemist and that his oral testimony adding on to the missing evidence in P43, must be rejected. In this context it is relevant

to refer to the *per curiam* observation of the Federal Court in *Ah Mee v. PP* [1967] 1 MLJ 220 which stated that s. 91 & 92 of the Evidence Act 1950 applies equally to criminal trials, no less than to civil proceedings.

There is yet another unsatisfactory feature in the evidence of the chemist. He candidly admitted that in an analysis of drugs, namely methamphetamine which was in pill form, homogeneity of the substance is an all important and vital pre-requisite. In this case the method adopted by SP4 to homogenise the pills was by grinding them in a domestic blender. But he admitted further that the 8-9 chemists in Penang would be using the 5-6 blenders that were available. He admitted that the blender he used had blades that were not sharp and because of that he also agreed that the pills could not be powdered evenly to be certified one-hundred percent homogenous. I have no hesitation in concluding that based on the admissions of the chemist the homogeneity of the drugs in powdered form is questionable. Perhaps it is time for the Chemistry Department to purchase either new blades or to replace the blenders.

Substance Seized An Offence, Both Under The DDA 1952 And The Poisons Act 1952

The last paragraph of the Chemist's Report prepared by SP4 (exh. P43) states that the drug methamphetamine is listed under the First Schedule of the DDA 1952 and also the First Schedule (item 400) and the Third Schedule (Psychotrpic Substances) of the Poisons Act 1952. The chemist is not correct in saying it is listed under the Third Schedule. It is in fact listed under the First Schedule of the Poisons Act 1952. The chemist further agreed under cross-examination that possession of the said substance can be an offence both under the DDA 1952 and also the Poisons Act 1952.

In this case the Public Prosecutor had chosen to charge the accused under the DDA which carries the death penalty whereas a charge under s. 13 of the Poisons Act 1952 and punishable under s. 32(2) of the Poisons Act 1952 carries a maximum sentence of a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both. In *Leong Bon Huat v. PP* [1993] 3 MLJ 11 SC the then Supreme Court made this relevant observation at p. 15. It states as follows:

> We note that in the Singapore case of *PP v. Ang Soon Huat*, where one of the contentions advanced by counsel for the accused was similar to that advanced in the present appeal, and where the contention was upheld, the court having reminded itself of the criminal standard of proof, had concluded that where the court was left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree

> will give rise to a mandatory sentence of death. The result, therefore, was that so far as the charge of trafficking in cannabis in contravention of s. 39B was concerned, 'the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty'. (Per Lord Hewart CJ in *R v. Wallace* applied by Thomson CJ in *Jubri v. PP*.)
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> Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute *in lieu* thereof, a conviction for possession of cannabis in contravention of s. 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.

(Also see *Shukri bin Mohd v. PP* [1995] 3 CLJ 799 SC). The prosecution could have at the close of it's case chosen to amend the charge to one under the Poisons Act 1952. However the learned deputy submitted that he was not relying on s. 37(d) of the DDA 1952 which reads as follows:

> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

The learned deputy however submitted that his entire case was dependent on s. 2 of the DDA 1952 relating to the definition of "trafficking". In other words he contended he was submitting on the basis that there was direct trafficking of the 'dangerous drugs' because of the manner in which the drugs were concealed on the person of the accused. If not for the abject failure to establish through the chemist's evidence that the pills were indeed dangerous drugs as stated in s. 2, I would have been readily moved by this submission.

But Mr. Jagdeep for the defence referred me to a recent *ex-tempore* decision of the Court of Appeal in *Toh Su Kuan v. PP* (D-05-82-98) delivered on 11 October 2002 wherein the facts were almost similar to the facts of the case before me. Counsel produced a typed ten page *ex-tempore* judgment. The facts of that case were that the accused had trafficked in 1,584.93 grams of heroin. On 4 February 1996 a police party laid an ambush at the Rantau Panjang bus station. PW5 (a police officer) saw the accused about to board a bus. PW5 arrested him. The target of their search on the accused was a revolver but this was not found on the accused. However when the accused was given a full body search at the police station the police found that the accused was carrying on his person 356 packets located on different parts of his body. 62 packets were found in his left shoe, 60 packets in his right shoe, 57 packets were found strapped to his left shin and an equal number to his right shin. 60 packets were found tied to his waist in the front and an equal number fastened

to his waist at the back. The packets were seized by the police and the chemist's report revealed the weight of heroin as 1,584.93 grams. He was convicted by the High Court. The prosecution, like in the case before me, declined to rely on the presumption s. 37(d), but instead chose to rely on s. 37(da)(i) (and not s. 39(da)(i)) as stated in the *ex-tempore* judgment. Since the prosecution had relied on this s. 37(da)(i) it was the view of the Court of Appeal that the prosecution had to prove that the appellant was in possession of the heroin contained in the packets found on the appellant's person. The Court of Appeal having distilled the decision of two cases (*Toh Ah Loh & Anor v. Rex* [1949] MLJ 54 and *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28) formed the conclusion "that 'possession' is an illusive concept". The Court of Appeal said at pp. 4/5 of it's judgment as follows:

> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge, there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug, the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. The Ordinance deals with both opium and with other drugs. Possession of opium is prohibited absolutely. Possession of drugs in general is not prohibited absolutely because many drugs are familiar household articles; it is only dangerous drugs are prohibited. The special presumption as to knowing the nature will therefore seldom apply to opium; it will more frequently apply to other drugs. A man might know that he had a white power, and therefore be in possession of a drug, but he might not know whether it was bicarbonate, a common household drug, or heroin, a dangerous drug of similar appearance. Such a case would resemble that of *Sleep*, *supra*. The distinction is not applicable in the present case but is mentioned here because counsel argued that the word "possession" is used in the different senses in the Ordinance. I do not think that is so. I think the word "possession" is used consistently in the Ordinance in its ordinary, but imprecise sense.

The Court of Appeal went on to hold at pp. 8/9 as follows:

> In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew the packets contained heroin, the drug which forms the subject matter of the charge. It follows from what we have said this far from the totality of the evidence led by the prosecution that the

> vital ingredient of possession required by section 37(da)(i) had not been established. On that ground alone the learned Judge ought not to have called the appellant to enter upon his defence.

Bound as I am by the principle of *stare decisis* and following the guideline set by this decision and on the basis of my earlier findings with regard to the other issues, I acquitted and discharged the accused without calling for the defence.

I did not amend the charge to an offence under the Poisons Act 1952 because of the inconclusive evidence of the chemist due to the doubt as to the homogeneity of the pills in the course of his analysis as to whether the drugs were such, as falling within the definition of the Poisons Act, let alone as falling within the definition of dangerous drugs, under the DDA 1952.

The Passport

The next day Mr. Jagdeep appeared and sought the release of Poh Ah Kwang's Singapore Passport (exh. P34) since he required his passport to reside even in Malaysia.

The learned deputy objected and indicated that he had instructions to appeal against the acquittal and retention of the passport he said would ensure the attendance of Poh Ah Kwang at the appeal. The court then invited counsel for both parties to submit on the issue as to whether the court had a right to retain the passport of someone who had been acquitted of an offence. Counsel asked for a day to research the law on this.

The next day Mr. Jagdeep submitted that when this court acquitted Poh Ah Kwang he was free from any constraint and that he should therefore be free to travel back to Singapore and s. 2(2) of the Passports Act 1966 required every person leaving Malaysia for a place beyond Malaysia, if required to do so by an immigration officer, to produce to that officer a passport. In *Loh Wai Kong v. Government of Malaysia & Ors* [1978] 2 MLJ 175 the court held at p. 178 as follows:

> Article 5(1) of our Constitution is not only applicable to citizens but also guarantees the liberty of any person including non-citizens whilst in this country. The expression "personal liberty" must therefore be liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires. Refusal or withdrawal of one's passport should therefore not be seen so much as affecting the right of a person to travel abroad but should be considered, in my view, in the light of whether there is violation of his right of personal liberty under Article 5{1) of our Constitution.

I accepted this proposition and held that any retention of the passport by this court after the accused's acquittal is a violation of art. 5(1) of our Constitution. If the accused wishes to return to Singapore and if he is required to produce the passport at the immigration point he certainly would not be able to do so if this court retained his passport. This is tantamount to imposing a restraint on his personal liberty to exercise free movement.

Another issue is with regard to the disposal of the exhibits, pursuant to s. 406A of the Criminal Procedure Code. The said section reads as follows:

> (1) At the conclusion of any proceedings under this Code the Court shall consider in what manner the exhibits shall be disposed of and may make any order for that purpose in accordance with law.
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> (2) If the Court makes no order as to the disposal of the exhibits they shall be handed to the police officer in charge of the proceedings and may be dealt with by the police in accordance with the provisions of this Chapter as if the Court had made an order or orders to that effect:
>
> Provided that if the police are at any time in doubt as to the proper manner of disposing of any exhibit, or if any person claims delivery to him of any exhibit and the police refuse l such delivery, the police or that person may apply summarily to the Court which determined the case and the Court shall make such order regarding the disposal of the exhibit as may be proper.

It is my judgment that what this court can dispose of under this section are exhibits relating to the commission of the offence like the drugs, the vehicle in which the drugs were transported and such like exhibits. The passport of a person cannot be the subject of disposal of exhibits. It must be returned to its owner.

In reply the learned deputy submitted that the prosecution had already filed a Notice of Appeal and that upon receipt of this judgment and upon reading it the Public Prosecutor would then decide whether to proceed or not with the appeal. He therefore asked this court to defer its decision until the decision of the Public Prosecutor whether to appeal or not.

Having heard arguments I ordered the release of the passport, the driving licence and the Singapore Identity Card to the appellant Poh Ah Kwang forthwith.